COL (B) HARBANS SINGH CHINGAR SINGH *a*

v.

AIRSPACE MANAGEMENT SERVICES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
AZMEL MAAMOR J
[ORIGINATING MOTION NO: R2-25-129-1998]
22 DECEMBER 1999

LABOUR LAW: *Industrial Court - Award - Dismissal of applicant with just cause and excuse - Whether Industrial Court correct in holding that applicant a probationer - Whether there were valid grounds for applicant's dismissal - Whether Industrial Court committed serious errors of law* *c*

The applicant applied for an order of *certiorari* to quash the award of the Industrial Court which held that the dismissal of the applicant by the 1st respondent was with just cause and excuse. *d*

The issues were whether the Industrial Court committed several errors of law when it held that: (i) the applicant was still on probation when he was dismissed based on a letter of offer purportedly received by the applicant from the 1st respondent and which was not signed by the applicant; (ii) the case of *Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd* did not deal with substantive law as regards probation; and (iii) there were valid grounds for the applicant's dismissal. *e*

Held: *f*

[1] The onus to prove that the letter of offer was received by the applicant lay with the 1st respondent. The acceptance could be proved if there was the signature of the applicant at the bottom of the said letter. Here, the provision for acceptance was there but it was not signed by the applicant. Thus, a presumption was raised that the said letter was not received by the applicant. The presumption would not apply if the provision for acceptance was not written on the said letter. The chairman of the Industrial Court gave undue emphasis on the very production of the said letter instead of giving due consideration to the non-signing of the provision for acceptance by the applicant. *g* *h*

[1a] Further, the document CO4 produced by the 1st respondent indicated that the applicant was the 2nd most senior officer of the company. It did not state that the applicant was on probation.

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[1b] The date of the letter of offer was dated one day before the applicant was interviewed and this in itself created a doubt as to the truthfulness of the said letter. It would be highly improper to rely on it. As such, it would be against the weight of evidence to conclude that the applicant was really taken in on probation. The issue of probation was important as it determined the status of the applicant in the company. By arriving at the wrong decision based on clear facts of the case, the chairman of the Industrial Court had committed a very serious error of law.

[2] The chairman of the Industrial Court miscontrued the *ratio decidendi* of *Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd* and committed a serious error of law. The Court of Appeal therein did deal with substantive law as regards probationary employees. If the said case had been properly considered, the decision of the chairman on the issue of probation would have been different.

[3] The grounds given by the 1st respondent in dismissing the applicant lacked merit. They were petty grounds for the punishment meted against the applicant. The chairman of the Industrial Court had committed an error of law in deciding that the dismissal of the applicant was with just cause.

[4] It would not be of benefit to any party to revert the case to the Industrial Court for a re-hearing. Whatever evidence that needed to be adduced had already been adduced.

[5] A reinstatement of the applicant to his former job would be inappropriate as there had been a long gap between the date of wrongful determination and the date of this decision. There was also a likelihood that the applicant would not be accepted. Adequate compensation was a better option to be awarded to the applicant.

[Arrears of salary from date of dismissal to date; in lieu of reinstatement compensation for 12 months' salary.]

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chinger Singh [1998] 2 ILR 1115 ***(refd)***

Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd [1997] 3 CLJ 827 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1)

For the applicant - David Gurupatham; M/s. David Gurupatham & Co
For the 1st respondent - Yusuf Khan; M/s Yusuf Khan & Pathmanathan

Reported by Usha Thiagarajah

JUDGMENT

Azmel Maamor J:

This is an application by the applicant by way of an originating motion for an order of *certiorari* to quash the award of the Industrial Court *vide Airspace Management Services Sdn. Bhd. v. Col (B) Harbans Singh Chinger Singh* [1998] 2 ILR 1115 dated 5 August 1998 which ruled that the dismissal of the applicant by the 1st respondent, Airspace Management Services Sdn. Bhd. was with just cause and excuse.

The facts of the case are briefly as follows. The applicant was appointed as the deputy project manager of the 1st respondent's company with effect from 14 July 1994. It was contended by the 1st respondent, though strenuously refuted by the applicant, that the applicant was appointed on probation for a period of six months. After the expiry of the six months period his probation was further extended for another six months period as the applicant was alleged to have failed to carry out his duties properly and also had abused his position as an employee of the 1st respondent company. As the 1st respondent was still not satisfied with the performance of the applicant and insisting that the applicant was still on probation, the 1st respondent issued a letter to the applicant dated 14 July 1995 terminating his services. Alleging that he had been wrongfully dismissed the applicant made representations to the Industrial Relations Department under s. 20(1) of the Industrial Relations Act 1967 and the matter was subsequently referred to the Industrial Court for an award. At the conclusion of the inquiry the chairman of the Industrial Court made a finding that the dismissal of the applicant by the 1st respondent was with just cause and excuse and as such the applicant's claim was dismissed. It was against this award of the Industrial Court that this application was made to this court by the applicant.

It was alleged by the applicant that the Industrial Court in arriving at the award had committed several errors of law. Firstly, the Industrial Court held that the applicant was still on probation when he was dismissed by the 1st respondent. Is this finding correct. The Industrial Court placed great reliance on a letter of offer dated 13 July 1994 purportedly issued by the 1st respondent to the applicant. Attached to the letter of offer was another document which stated the terms and conditions of service of the applicant and this included a provision which required the applicant to be on probation for a period of six

months before he could be confirmed. It is to be noted that at the end of the letter of offer there was a clause stating **"I hereby accept the offer and agree to the terms and condition"** to be signed by the applicant. But it remained unsigned by the applicant. At the inquiry the applicant stated that he did not receive this letter of offer at all. He was interviewed by COW1 (Arthur Reynolds) on 14 July 1994. Resulting from that interview the applicant was accepted verbally to work in the 1st respondent company without any letter of offer. The applicant alleged that there was no letter issued to him. That letter of offer was falsely created to give the impression that he was taken in on a probation for six months' period. Even the date of the letter of offer was irregular. It was dated 13 July 1994 when in fact he was only interviewed on 14 July 1994. Despite all these facts the Industrial Court arrived at the conclusion that the applicant had received the letter of offer. In the award the chairman of the Industrial Court said:

> He, however, did not dispute he was paid and had worked according to the terms and conditions of CO1 for several months. Based on those facts this Court cannot disregard a document which is in writing and ignore it in preference to a verbal agreement.

Obviously the learned chairman had misconstrued the issue. The issue was whether the letter of offer (exh. CO1) was received by the applicant. To begin with the onus to prove that the letter was received by the applicant lies with the 1st respondent. In this case the acceptance could be condusively proved if there was the signature of the applicant at the bottom of the said letter. Here, the provision for acceptance was there but it was not signed by the applicant. In such circumstances a presumption is raised that such letter had not been received by the applicant. In the light of the existence of such presumption it would be the responsibility of the 1st respondent to explain why the letter of offer had not been signed by the applicant. No such explaination appeared to have been given by the 1st respondent. In my view such presumption would not apply if the provision for acceptance was not written on the letter of offer. The Chairman of the Industrial Court, instead of giving due consideration to the non-signing of the provision for acceptance by the applicant had given undue emphasis on the very production of the letter of offer. On the other hand there was the production of a document CO4 produced by the 1st respondent stating quite categorically that the applicant was the administration manager of the 1st respondent appearing immediately below the name of A. Reynolds. It did not say the applicant was on probation. Hence to an extent it strengthened the claim by the applicant. The content of CO4, prepared by COW1 and produced by him, must be true. In the presence of such documentary facts it is inconceivable how the Industrial Court could arrive at the conclusion that the applicant was a probationary employee. Bearing in mind that the onus is only the respondent to prove, and having

regard to the fact that the alleged applicants' letter was not signed by the applicant to acknowledge receipt thereby creating an adverse presumption against the acceptance thereof, coupled with the fact that in the document CO4 the applicant's name appeared as the administration manager immediately below A. Reynolds' name indicating he was the 2nd most senior officer of the company, the Industrial Court's conclusion that the applicant was a probationary employee merely because the applicant admitted that most of his terms of employment were as stated in the offer letter, was in my view, totally misconceived. Even the date of the offer letter which was dated one day before the applicant was interviewed in itself had created doubt in the truthfulness of the said letter. Without any reasonable explanation given it would be highly improper to rely on it. Taking the whole circumstances into consideration it would be against the weight of evidence to conclude that the applicant was really taken in on probation.

The issue on probation is important because it would determine the status of the applicant in the 1st respondent company. Therefore by arriving at the wrong decision based on clear facts of the case the Industrial Court had committed a very serious error of law. This is the principle that has been laid down in the Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where Edgar Joseph Jr FCJ said (at p. 224):

> (1) Reliance upon erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Union & Ors v. Minister for the Civil Service* [1985] AC 374 ...
>
> (2) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v. Bairstow* [1956] AC14); *Din (Taj) v. Wandsworth LBC* at p. 664 H, per Lord Wilberforce; *R v. Hillingdon LBC ex parte Islam (Tafazzul)* [1983] 1 AC 688 at p. 708D, per Lord Wilberforce at p. 717 G. per Lod Lowry.

The learned chairman of the Industrial Court had misconstrued the *ratio decidendi* of the Court of Appeal case of *Khaliah bte Abbas v. Pesaka Capital Corporation Sdn. Bhd.* [1997] 3 CLJ 827.

In referring to the above case, the Industrial Court quoted the decision of the *Pesaka Capital* case as follows:

> The requirements of *bona fides* is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal.

After having stated that portion of the Court of Appeal decision the Industrial Court in its award said:

> However, the *Pesaka Capital* case concerns whether a probationer is a workman within the meaning of Section 20(1) of the Industrial Relations Act, 1967 and whether the Industrial Court has jurisdiction to determine the dismissal of a probationer with or without just cause. **The *Pesaka* case is about jurisdiction and not on substantive law as regards probation**. (emphasis added).

In my view the chairman of the Industrial Court had committed another serious error of law. The Court of Appeal did deal with substantive law as regards probationary employees. I quote below the relevant provision of the Court of Appeal decision on this issue:

> The before, employees on probation would come within the purview of s. 20(1) of the Act and the Industrial Court would have jurisdiction to hear and determine whether the dismissal of the appellant was with just cause or excuse. *Consequently, an employee on probation would enjoy the same rights as a permanent or confirmed employee and, therefore, his or her services could not be terminated without just cause or excuse*. (emphasis added).

I am sure if the *Pesaka Capital* case had been properly considered the decision of the learned chairman of the Industrial Court on the issue of probation would have been different.

I have observed that the learned chairman of the Industrial Court had placed great reliance on decisions of Industrial Court cases to the level of being authoritative. It must be stressed that the Industrial Court are courts lower than the High Court. While reference to the decision of the Industrial Court can be made, but such decisions after having been overruled by the High Court or other courts of higher authorities, would no longer become good law. In the *Pesaka Capital* case the decision of the Court of Appeal will prevail over the decision of the Industrial Court.

At the Inquiry the Industrial Court proceeded to consider the grounds given by the 1st respondent in dismissing the applicant. It is therefore appropriate for me to consider also the merits of such grounds with a view to determine whether the dismissal was in fact with just cause and excuse.

Firstly, the 1st respondent alleged that the applicant had been habitually absent from his desk. The facts adduced in respect of this ground were relied upon by the Industrial Court on the evidence of COW1 who, being a Malaysian Airlines Services pilot, was away from the office most of the time. According to COW1 he called the office but could not contact the applicant who was not in office. This information was told to him by certain junior staff of the company.

In my view the very nature of the duties of the applicant required him to be away from the office most of the time to meet relevant government officials. He would not be able to carry out his duties as deputy project manager effectively if he were to remain all the time in his office. Merely making contacts by using the telephone without meeting the officials personally would serve no useful purpose and nothing would be achieved. Had he adopted such style then it can be assumed that the applicant had failed to carry out his duties effectively. While it was not denied that the applicant was not in office when COW1 called him that cannot be conclusive evidence to say that he was not carrying out his duties. Hence I was unable to accept this ground as having any merit.

Secondly, it was alleged that the applicant had abused his position as deputy project manager and utilising company's assets and staff. The alleged act of abuse was in respect of the applicant directing staff to photostat documents for his private use and to post personal mails for him. In my view this ground is too petty to be given any consideration at all, least of all as a ground for dismissal. Certainly, an officer of the status of a deputy project manager can make use of the staff to do certain private errands. Otherwise one cannot even ask the office boy to buy one's food and other personal needs. I therefore dismiss the ground without giving much consideration for being too petty. It certainly was a poor ground for dismissal.

Thirdly, the applicant was alleged to have been acting in dereliction of his specific duties as deputy project manager in that he delegated his task of securing the work permit for the company's expatriate officer to a personal secretary.

Again there is not much merit in respect of this ground. Delegating one's authorities is part of good management. To do all one's duties alone may be regarded as an act of stupidity. A war is not fought by a general alone. In respect of the application for the work permit of the expatriate officer the complain levelled against the applicant was apparently due to the imposition of certain payment of fees by the authorities. That is something which is statutorily imposed.

To blame it on the applicant for not having it waived would be utterly unfair. Furthermore work permits are not issued by the applicant. It is issued at the absolute authority of the immigration department. The refusal of any work permit to any of the expatriate of the 1st respondent cannot be automatically blamed on the negligence of the applicant. Before doing so, a proper investigation must be carried out by the 1st respondent to determine whether in fact the applicant had committed an act of negligence that led to the refusal of the issuance of the work permit. No evidence of such negligent act had

adduced in respect of such investigation being carried out by the 1st respondent against the applicant. Merely making wild accusation is manifestly inadequate. I therefore concluded that this ground lacked merit.

Finally the 1st respondent alleged that the applicant had been conducting his own private business in the position of managing director while being employed with the company.

On this issue two things must be borne in mind. Firstly, in order to prevent employees from being involved in their own private business there must exist in the company rules and regulations stating that such activities cannot be conducted. Secondly, even if such rules and regulations do exist such private business should only be disallowed if there is likelihood that it may be in conflict with the activities of the 1st respondent. The onus is on the 1st respondent to prove all these. However, no such evidence had been adduced at all by the 1st respondent. It was explained by the applicant that he was running his family business. No evidence of conflict was even adduced. This ground should also fail.

Having considered all the above grounds relied upon by the 1st respondent to dismiss the applicant I was of the view that they would not be used to dismiss the applicant. They were petty grounds for the punishment meted against the applicant. I therefore found it very difficult to agree that the dismissal was with just cause or excuse. For the reasons as I have stated above the Industrial Court had committed an error of law in deciding that the dismissal of the applicant was with just cause. As such the conclusion of the Industrial Court should be reversed.

In the light of the circumstances of this case I held the view that it would not be of benefit to any party to revert the case to the Industrial Court for a re-hearing. Whatever evidence that needed to be adduced had already been adduced. It would be a sheer waste of time and expenses to let the matter go back to the Industrial Court. Relying on the authority of the case of *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147 I hereby exercised my discretion to dispense with sending this case back to the Industrial Court and to decide myself on the issue of compensation or other redress for the applicant. I have in the course of such objective, asked both counsels to address me on this issue of compensation but they replied that they would leave it entirely to the court to decide.

In my view to order a reinstatement of the applicant to his former job would be inappropriate as there had been a long gap between the date of wrongful determination and the date of this decision and also there is likelihood that the applicant would be unacceptable by COW1. In such circumstances adequate

compensation should be the better option to be awarded to the applicant. Taking into consideration the claim made by the applicant based on what had been promised by COW1 as supported by the document CO4, I awarded compensation to be in the following terms:

1. The applicant be awarded arrears of salaries from the date of dismissal to today at the rate of RM11,000 per month.

2. *In lieu* of reinstatement the applicant was awarded compensation for 12 months salary at the rate of RM11,000 per month.

Having regard to the sufferings that had been caused to the applicant I considered this amount to be fair.